No. 78-664

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NEW YORK SHIPPING ASSOCIATION, INC., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

New York Shipping Association, Inc. ("NYSA") and International Longshoremen's Association, AFL-CIO ("ILA") jointly petition for a writ of certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit in this case (Appendix [hereinafter "App."] A, *infra*, pp. 1a-2a).

Opinions Below

The Court of Appeals for the Third Circuit affirmed *per curiam* without opinion the judgment of the United States District Court for the District of New Jersey (App. B, *infra,* pp. 3a-4a), which established a special dispensation under federal labor law for the Waterfront Commission of

New York Harbor ("Commission"). The district court relieved the Commission from the obligation, universally applicable to other governmental agencies, to adhere to the fundamental tenet of national labor policy which forbids governmental intrusion into the collective bargaining process.

The judgment order of the Third Circuit (App. A, *infra,* pp. 1a-2a) and the opinion of the district court (App. C, *infra,* pp. 5a-22a) are unreported.

Jurisdiction

The judgment order of the Third Circuit (App. A, *infra,* pp. 1a-2a) was entered on August 1, 1978. This petition for a writ of certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether the courts below, in conflict with prior decisions of this Court, changed the national labor policy on the New York-New Jersey waterfront by erroneously determining that a local administrative agency, created under a bi-state compact, may interfere with free collective bargaining and impose its own substantive terms and conditions of employment upon the bargaining parties?

Statutes Involved

The relevant statutory provisions are as follows:

(1) National Labor Relations Act of 1935, § 1, as amended, 29 U.S.C. § 151 (1970);

(2) The following provisions of the Waterfront Commission Compact of New York and New Jersey:

(a) Part I, § 1, Art. VIII, ¶ 1, codified in N.Y. Unconsol. Laws § 9827 (McKinney, 1974) and in N.J.S.A. 32:23-27 (1963);

(b) Part I, § 1, Art. XV, ¶ 1, codified in N.Y. Unconsol. Laws § 9868 (McKinney, 1974) and in N.J.S.A. 32:23-68 (1963);

(c) Part I, § 1 Art. XV, ¶ 2, codified in N.Y. Unconsol. Laws § 9869 (McKinney, 1974) and in N.J.S.A. 32:23-69 (1963); and

(d) Part I, § 1, Art. XVI, ¶ 1, codified in N.Y. Unconsol. Laws § 9870 (McKinney, 1974) and in N.J.S.A. 32:23-70 (1963);

(3) The approval of Congress to the Waterfront Commission Compact of New York and New Jersey, Act of Aug. 12, 1953, c.407, 67 Stat. 541; and,

(4) Waterfront Commission Act of New York and New Jersey, § 5-p, added to the Compact in New York by 1966 N.Y. Laws c.127, § 3 (codified in New York Unconsol. Laws § 9920 (McKinney 1974)) and in New Jersey by 1966 N.J. Laws c.18, § 2 (codified in N.J.S.A. 32:23-114 (1963)).

These relevant statutes are set out in App. D, *infra*, pp. 23a-30a.

Statement of the Case

A. Preliminary Statement

This case involves the Commission's Determination 15, issued on March 17, 1978, which imposed upon labor and

management, the Commission's unilateral remedy for shortages of checkers in the Port of New York.[1] Determination 15 was an unprecedented attempt by the Commission to transfer 200 currently registered longshoremen to permanent checker positions in accordance with the Commission's self imposed priorities of selection. Determination 15 directly supplanted existing collectively bargained provisions prescribing eligibility and priorities for the transfer of longshoremen to checker status.

B. Longshore Collective Bargaining

Petitioners, New York Shipping Association, Inc. ("NYSA") and International Longshoremen's Association, AFL-CIO ("ILA"), are the exclusive, certified collective bargaining representatives in the Port representing management and labor respectively. *Matter of New York Shipping Ass'n,* 116 N.L.R.B. 1183 (1956). Over many decades, NYSA and ILA have developed through the collective bargaining process a complex scheme of seniority, transfer and fringe benefit rights for all dockworkers in the Port.

The NYSA-ILA collective bargaining agreement establishes separate and distinct seniority classifications for each category of labor. Thus, a longshoreman does not have any seniority as a "checker" and vice versa. Seniority determines a waterfront worker's priority for employment, obligation to accept employment and, concomitantly,

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[1] "Checkers" are waterfront employees who perform the clerical task of verifying and tallying cargo. "Longshoremen" are waterfront employees who physically handle oceanborne cargo at waterfront facilities, including its stowage or removal from steamship vessels. "Holdmen" are those longshoremen who work within the cargo holds of the vessels.

eligibility to receive fringe benefits, including guaranteed annual income ("GAI").[2]

The NYSA-ILA labor contract also sets forth the rights, priorities and procedures for transfers to checker status. It has provided, since 1968, that only A, B, C or D seniority longshoremen can be transferred to the checker category in the order of their seniority. These senior longshoremen, pursuant to their contractual seniority rights, need not accept the strenuous work of handling cargo in the holds of steamship vessels. By limiting eligibility for checker transfers to longshoremen from these classifications, the collective bargaining agreement assures an adequate supply of holdmen. In addition, the use of less senior longshoremen for hold work leaves unfilled other positions that more senior employees are required to accept lest they forfeit their GAI benefits. This collectively bargained transfer provision, which Determination 15 directly overrides,[3] provides an essential mechanism for reducing the substantial GAI costs in the Port.

The contractual transfer provision has been invoked only once, in 1969, when 500 transferees from other crafts were accepted into the checker ranks. Since 1969, until the issuance of Determination 15, there have been no *en masse* permanent transfers of workers to checker status. However, there have been daily utilizations of longshoremen as checkers on an emergency basis, pursuant to other contractual provisions, which do not affect their seniority

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[2] Each longshore employee is guaranteed an annual income of $18,304 equal to a full year's employment of 2,080 hours at the prevailing $8.80 an hour wage rate. The GAI benefit, which was designed to cushion the loss of longshore work opportunities resulting from technological advances in cargo handling techniques, like containerization, is in addition to other fringe benefits, such as vacations, holidays, pension, life insurance, medical, dental, optometric benefits, etc.

[3] Most of the applicants for transfer to checker positions under Determination 15 have been holdmen in the lower E, F, G and H seniority classifications.

rights as longshoremen nor create any permanent checker rights.

C. The Commission and The Compact

Respondent Commission is an agency of the States of New York and New Jersey created pursuant to a bi-state compact (the "Compact") approved in 1953 by an Act of the Congress of the United States (App. D, *infra,* pp. 26a-27a). Its jurisdiction, power and authority were formulated to correct certain corrupt practices then existing on the waterfront in the Port of New York. The abuses that existed in 1953 have long since been alleviated, and the present longshore work force of 11,000 workers is hired and dispatched throughout the Port principally by a sophisticated computer program created and administered jointly by NYSA and ILA. The collective bargaining process, by stabilizing employment opportunities and eliminating undesirable employment practices, has solved the very problems for which the Commission was created.

The Commission was originally authorized to establish and maintain a longshoremen's register. Registration involves a screening process designed to remove undesirables from the docks and is a prerequisite for longshore employment (App. D, *infra,* pp. 26a-27a). In 1957, the Commission was further authorized to establish within this register a list of all qualified longshoremen eligible for employment as checkers (N.Y. Unconsol. Laws § 9918 (McKinney, 1974); (N.J.S.A. 32:23-105 (1963)). These registration powers were never intended as a basis for the Commission's intrusion into the collective bargaining process. On the contrary, Article 15 of the original Compact expressly provides that nothing contained therein is to be construed or utilized in any way to impair or otherwise infringe upon the rights of all waterfront employers and workers

> *to bargain collectively and agree upon any method for the selection of such employees by way of sen-*

> *iority, experience, regular gangs or otherwise.* App. D, *infra,* p. 26a. (*emphasis supplied*). *See also,* App. D, *infra,* p. 25a.

The original Compact empowered the Commission to regularize longshore employment. The exercise of this power was limited to the removal from the register of those casual employees who failed to work or to appear for work a certain minimum number of days. The Compact was amended in 1966 by § 5-p[4] to expand this power to encompass the control of the size of the longshore work force. § 5-p thus authorizes the Commission to suspend the enrollment of new employees from outside the industry by closing the register. Thereafter, the Commission's sole function under § 5-p is to determine when to open the register and how many new applicants to register. § 5-p expressly requires that the new entrants be registered in the order in which their applications are filed (App. D, *infra,* pp. 27a-30a). § 5-p also preserved the collective bargaining safeguards of the original Compact as follows:

> Nothing in this section shall be construed to modify, limit or restrict in any way any of the rights protected by article 15 of this act. (App. D, *infra,* p. 30a)

D. The Instant Controversy

Since 1969, there have been intermittent shortages of checkers in the Port. In the past NYSA and ILA have periodically agreed to the transfer of limited numbers of longshoremen to checker status. NYSA and ILA selected the transferees and determined their employment rights and privileges. The Commission then enrolled these already registered transferees as checkers. Until Determination 15, the Commission had never attempted to thwart the transfers adopted by NYSA and ILA nor to ef-

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[4] This amendment, unlike the original Compact, was never approved by Congress.

fectuate unilaterally its own transfers over their objections as the collective bargaining representatives in the Port.

In the 1976/77 period, daily shortages of checkers in the Port occurred with increasing frequency. NYSA and ILA negotiated a new permanent remedy for these shortages. They provided for the establishment of a small pool of temporary checkers from persons outside the industry who would be available to fill any intermittent checker shortages. These temporary checkers would not be entitled to GAI or other fringe benefits—a tremendous cost savings to the industry. Although it initially approved this negotiated solution, the Commission thereafter inexplicably refused to register the temporary checkers. Instead, the Commission attempted to impose immediately and unilaterally upon NYSA and ILA its own remedy for the checker shortages.

On March 17, 1978, the Commission, acting pursuant to its purported authority under § 5-p, issued Determination 15 which provided that the Commission would (1) unilaterally transfer and re-register 200 longshoremen as checkers and (2) afford priority of selection to physically disabled longshoremen. The district court conceded that "the *methods* employed by the Commission" in Determination 15 "are not specifically authorized by Section 5-p" (App. C, *infra*, p. 15). Determination 15 purports to transfer longshoremen to checker status under § 5-p, although that section expressly limits the Commission's authority to the acceptance of *new* applications for inclusion in the longshoremen's register and does not authorize the transfer of already registered longshoremen to checker status. Moreover, Determination 15 improperly establishes a priority of selection, in favor of disabled longshoremen, although § 5-p mandates selection in the order in which applications are filed.

NYSA and ILA protested Determination 15. They advised the Commission that it unlawfully intruded upon their collective bargaining rights and seriously impaired the

competitive position of the Port of New York. Determination 15 would transfer longshoremen needed for hold and other work to the checker category, thus creating shortages of longshoremen. The longshore industry would then be compelled to pay substantial GAI and other fringe benefits to checkers when work is unavailable for them. This would increase total labor costs in the Port and thus cause diversion of cargo to other ports.

E. Proceedings Below

On May 9, 1978 NYSA and ILA commenced an action in the United States District Court for the District of New Jersey seeking a declaratory judgment and other appropriate injunctive relief, prohibiting the implementation by the Commission of its Determination 15. Federal jurisdiction was invoked under 28 U.S.C. §§ 1337 and 2201 and under 29 U.S.C. § 185. The thrust of the complaint was that the Commission's Determination 15 impermissibly intrudes into an area which has been "pre-empted" by federal law, namely, § 1 of the National Labor Relations Act, 29 U.S.C. § 151, which provides that the collective bargaining process is to be free of any governmental interference (App. D, *infra*, pp. 23a-24a). The federal courts have subject matter jurisdiction to restrain such interference with federal labor law rights. *Amalgamated Transit Union, Div. 819* v. *Byrne*, 568 F.2d 1025 (3d Cir. 1977) (*en banc*); *General Electric Co.* v. *Callahan*, 294 F.2d 60 (1st Cir. 1961), *petition for cert. dismissed*, 369 U.S. 832 (1962).

On June 1, 1978, the district court entered summary judgment in the Commission's favor dismissing the complaint. The district court conceded that Determination 15 directly intruded into the matter of "employee transfers", which is commonly the subject of collective bargaining, and thus "generally within the exclusive province of employers and unions" under the doctrine of federal preemption (App. C, *infra*, p. 16a). Nevertheless, it held that it could be presumed that Congress in approving the Compact intended to authorize this intrusion (App. C, *infra*, p. 18a).

In the district court's view, the Congressional approval of a bi-state compact may override national labor policy by creating a special exemption in favor of the bi-state agency that is unavailable to other state and federal agencies. On August 1, 1978, the Third Circuit affirmed without opinion the judgment of the district court.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With The Well Established Principle Of Federal Labor Policy, Articulated By This Court In Numerous Decisions, Which Mandates Governmental Neutrality And Non-Interference In Collective Bargaining

The district court decision, affirmed by the Third Circuit, that the Commission is authorized to dictate the substance of collective bargaining by imposing the terms and conditions for transfers by longshoremen to checker status, directly conflicts with prior decisions of this Court in *Lodge 76, Internat'l Ass'n of Machinists & Aerospace Wkrs.* v. *Wisc. Employment Relations Comm'n,* 427 U.S. 132 (1976) and related cases.[5] The decision here is important not only because of this conflict, but also because it represents a significant judicial departure from the fundamental goal of national labor policy, *i.e.,* a regime of collective bargaining free from governmental interference or regulation. *NLRB* v. *Burns Internat'l Security Services, Inc.,* 406 U.S. 272, 288 (1972); *H.K. Porter Co., Inc.* v. *NLRB,* 397 U.S. 99, 108 (1970); *NLRB* v. *Insurance Agents Internat'l U.,* 361 U.S. 477, 489-90 (1960).

National labor policy is universally applicable to governmental agencies without exception. In *Lodge 76,* this

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[5] *See, e.g., Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees* v. *Wisc. Employment Relations Board,* 340 U.S. 383 (1951).

Court applied the doctrine of federal preemption to compel state agencies' adherence to the federal policy of free collective bargaining.

> Our decisions . . . have made it abundantly clear that state attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB: 'Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.'

Id. at 153 (citation omitted).

The district court here refused to apply the doctrine of federal preemption to bar the Commission's interference with federal collective bargaining rights, although it expressed reservations on what it considered to be "serious" and "highly arguable" questions of law (Transcript of Oral Argument, App. E, *infra,* p. 33a). The court recognized that Determination 15 affected "employee transfers" which are commonly matters of collective bargaining and within 'the exclusive province of employers and unions" under the doctrine of federal preemption (App. C, *infra,* p. 16a). Nevertheless, it held that the Congressional approval of the original Compact shielded the Commission from the proscriptions of federal preemption and empowered the Commission to violate federal labor policy by encroaching upon the collective bargaining process. The court's ruling in this regard, which petitioners believe to be in error, thus raises important issues relating to the extent to which Congressional approval of a bi-state compact can dilute or completely abrogate national labor policy.[6]

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[6] "The construction of a compact sanctioned by Congress under Art. 1, § 10, cl. 3, of the Constitution presents a federal question . . . Moreover, the meaning of a compact is a question on which this Court has the final say." *Petty* v. *Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275, 278 (1959) (citations and footnote omitted). *See also, Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 101, 110 (1938).

The decision below rests upon a faulty syllogistic ratiocination. Its major premise is the approval by Congress of the original Compact. In reliance upon this Court's decision in *Deveau* v. *Braisted,* 363 U.S. 144 (1960), the court below held that this approval extended not only to the Compact itself but also to supplemental legislative enactments in furtherance of its basic objectives (App. C, *infra,* p. 15a). The court's minor premise is that the supplemental legislation in issue, § 5-p, is designed to eliminate the evils that arise from a vast oversupply of longshore workers, one of the Compact's original objectives (App. C, *infra,* p. 12a). These two premises, assuming *arguendo* they are correct (and they are *not*), would support only the conclusion that § 5-p was impliedly approved by Congress. However, this was not the lower court's holding since the validity of § 5-p was not in issue. Rather, the court concluded that Determination 15, although not specifically authorized by § 5-p, is a valid intrusion into collective bargaining since it falls within the parameters of the original Compact's Congressional approval, by virtue of its effect in carrying out one of the objectives of § 5-p, namely the encouragement of the mobility and full utilization of the existing longshore work force (App. C, *infra,* pp. 14a-15a).[7]

The lower court's reasoning in this case suffers from several infirmities. First, its major premise is defective. It erroneously assumes that the Congressional approval of the original Compact has a broad prospective reach. This faulty assumption arises from the district court's

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[7] This objective was not one of the purposes of the original Compact. It was first introduced in § 5-p. *Deveau* therefore does not support the district court's analysis of first premising its holding upon an implied Congressional approval of amendatory legislation in furtherance of the objectives of the original Compact, *i.e.,* § 5-p, and then extending this approval to an adjudication (not a legislative enactment), *i.e.,* Determination 15, which does not further an objective of the original Compact.

misconstruction of *Deveau*. The *Deveau* case is inapposite in three critical respects:

> (1) The subject matter of *Deveau* was a legislative enactment amending the original Compact; the case at bar involves an adjudicatory administrative determination which has never been expressly sanctioned by any legislation, state or federal;
>
> (2) In *Deveau*, Congress was fully aware of the impending passage of the challenged amendment when it approved the Compact in 1953 (*Id.* at 151); the case at bar involves a determination issued in 1978 purportedly under the authority of an amendatory provision enacted without Congressional approval in 1966, 13 years after Congress adopted the original Compact; and
>
> (3) In *Deveau* the challenged legislation, which dealt with the disqualification of a union from collecting dues if any of its officers was a convicted felon, was intimately related to the eradication of the evils that the Compact was designed to correct; the case at bar involves a determination of economic and labor relations policies unrelated to the underlying objectives of the Compact.

Deveau's holding was narrowly confined to the validation of express legislative action of which Congress was consciously mindful and which was directly related to the Compact's purpose, *i.e.*, the prevention of crime. It is hardly authority to support a principle of implied *carte blanche* Congressional approval of any Commission action in derogation of national labor policy, particularly Determination 15, which is not authorized by the Compact or § 15, and does nothing to further the Compact's underlying objectives.

The lower court's error is further evident from the fact that its interpretation of the scope and nature of Congress' approval of the Compact is directly contrary to the clear language of the Compact which expressly safeguards the collective bargaining rights of NYSA and ILA. Even without such explicit language, this national labor policy would take precedence over a bi-state compact. But here, by its own terms, the Compact is brought into conformity with federal law. Article 15 of the original Compact approved by Congress specifically proscribes any construction of the Compact which would

> limit in any way any rights of longshoremen . . . or their employers to bargain collectively and agree upon any method for the selection of such employees by way of seniority, experience, regular gangs or otherwise.

App. D, *infra*, p. 26a. The last sentence of § 5-p, the purported authority for Determination 15, incorporates the collective bargaining safeguards of Article 15 (App. D, *infra*, p. 30a). In permitting the Commission's interference with collective bargaining rights, the Court below proceeded as though Article 15 and the last sentence of § 5-p do not exist. This result is contrary to the fundamental canon of statutory construction that in construing a statute, an interpretation should be reached which gives effect to every provision. *Allied Chemical & Alkali Wkrs.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971); *Richards* v. *United States*, 369 U.S. 1, 11 (1962); *NLRB* v. *Lyon Oil Co.*, 352 U.S. 282, 288 (1957).

Another defect in the *ratio decidendi* below is the factual inaccuracy of the court's minor premise. The vast overabundance of 70,000 dockworkers in 1953, which had then been the cause of these underpaid employees being subjected to the extortionate practices of kickbacks and loan-

sharking as the price for securing the limited available jobs, no longer exists in the Port of New York. Today, each longshore worker in the small current work force of 11,000 employees enjoys the protection of a GAI of more than $18,000 per year.

The most critical error in the lower court's reasoning is its specious conclusion validating Determination 15 despite the court's express admission that "the *methods* employed by the Commission in effectuating the Compact are not specifically authorized by Section 5-p." (App. C, *infra*, p. 15) and that "I find nothing in the statute that specifically enables the Commission to do what it's done" (Transcript of Oral Argument, App. E, *infra*, p. 32a). Section 5-p merely permits the opening of the register to add new entrants from outside the industry. It does not permit the transfer of currently registered longshore employees from one labor classification to another. Determination 15 also violates the very specific direction of § 5-p that applications must be processed in the order in which they are filed. Instead it has created a new category of employees entitled to a specific preference, namely the physically disabled.

Determination 15, then, violates (1) the national labor policy of free collective bargaining as formulated by Congress and applied by this Court; (2) the express prohibitions of the original Compact and of § 5-p safeguarding this national labor policy; and (3) the limits of authority granted to the Commission by § 5-p. Thus, the Commission's wrongful interference with federal labor rights emanates neither from the Compact originally approved by Congress nor from § 5-p, the supplemental amendment to the Compact. Rather, it arises because of the Commission's misuse of that amendment in formulating Determination 15. The Congressional approval of the original compact can hardly be extended to an adjudicatory determination which is both unauthorized and actually pro-

hibited by the supplemental legislation. It is well settled that an administrative agency can only exercise the express powers conferred upon it by its enabling legislation. *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961).

The decision below places NYSA and ILA in an untenable position in determining the extent of their respective rights and functions. In contravention of national labor policy, a third party has intruded into the collective bargaining process. The employment rights of 11,000 longshoremen in the largest Port in the United States are no longer in the hands of their chosen bargaining representative. Instead, there is now a governmental third party at the bargaining table which can dictate their collective bargaining rights in the guise of eliminating phantom waterfront evils. This is possible because of the court's unwarranted transformation of original Congressional approval into an unrestricted license for the Commission to disregard federal collective bargaining policy despite the preservation of that policy by the express language of the Compact. If the decision below is left undisturbed, free collective bargaining, as contemplated and heretofore protected by federal labor law, will no longer exist in the longshore industry in the Port of New York. Since this case involves important matters of national labor policy, the effect thereon of a bi-state compact and the scope of an earlier decision of this Court, it is appropriate for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
October 17, 1978

Respectfully submitted,

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APPENDIX A

Judgment Order

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-1659

NEW YORK SHIPPING ASSOCIATION, INC. and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Appellants

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR

On Appeal from the United States District Court for the District of New Jersey

C. A. No. 78-0995

Argued July 24, 1978

Before: ADAMS, WEIS and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

Appendix A—Judgment Order.

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Each side to bear its own costs.

BY THE COURT,
/s/ ARLIN M. ADAMS
Circuit Judge

ATTEST:
/s/ FRANCES R. MATYSIK
Acting Clerk

DATED: August 1, 1978

Certified as a true copy and issued in lieu of a formal mandate on August 23, 1978.

Test: /s/ M. ELIZABETH FERGUSON

Acting Clerk, U.S. Court of Appeals
for the Third Circuit

APPENDIX B

Order and Judgment

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil No. 78-995 (H.C.M.)

NEW YORK SHIPPING ASSOCIATION, INC. and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Plaintiffs,

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Defendant.

This cause having come on to be heard upon plaintiffs' motion for a preliminary injunction to enjoin defendant Waterfront Commission of New York Harbor from implementing Determination Number 15 and defendants having moved for summary judgment and plaintiffs having crossed moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered the pleadings in the action, including the affidavits filed herein and the exhibits annexed thereto, and the Court having heard the argument of counsel, and due deliberation having been had thereon, it is

ORDERED, that the plaintiffs' motion for a preliminary injunction be and the same is hereby denied, and it is further

ORDERED, that the implementation of said Determination Number 15 be stayed until June 9, 1978 or until such further date as may be ordered by this Court or by the United States Court of Appeals for the Third Circuit, and it is further

Appendix B—Order and Judgment.

ORDERED, ADJUDGED AND DECREED, that the plaintiffs' cross motion for summary judgment be and the same is hereby denied and that the defendant's motion for summary judgment be and the same is hereby granted.

/s/ H. CURTIS MEANOR
U.S. District Judge

Dated: May 31, 1978

We hereby consent to the form of the within order.

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APPENDIX C

Opinion

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 78-295

NEW YORK SHIPPING ASSOCIATION, INC., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Plaintiffs,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Defendant.

Appearances:

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and
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(New York Bar)
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D. Caruso, Esq.
Attorneys for Plaintiff New York Shipping Association, Inc.

Messrs. Gleason, Laitman & Mathews
(New York Bar)
By: Thomas W. Gleason, Esq.
Attorneys for Plaintiff International Longshoremen's Association, AFL-CIO

Appendix C—Opinion.

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General Counsel for Defendant
and
Irving Malchman, Esq.
Director of Litigation and Research for Defendant

MEANOR, District Judge.

This matter originally came before the court upon plaintiffs' application for preliminary injunction returnable May 22, 1978. Thereafter, defendant filed a motion for summary judgment, which was followed by plaintiffs' cross-motion for summary judgment. The entire controversy was then adjourned until May 26, 1978. At the oral argument both sides agreed that there were no issues of fact and that the matter was ripe for decision as a matter of law.

Plaintiffs are the New York Shipping Association, Inc. (N.Y.S.A.) and the International Longshoremen's Association, AFL-CIO (I.L.A.). Defendant is the Waterfront Commission of New York Harbor (Commission). The gist of the complaint asserts violations of the Labor Management Relations Act (29 U.S.C. § 141 *et seq.*), invoking jurisdiction under 28 U.S.C. §§ 1337 and 2201; 29 U.S.C. § 185, and venue pursuant to 28 U.S.C. § 1391.

HISTORICAL BACKGROUND

During the first half of this century, a number of public investigative bodies issued reports which exposed the many and chronic evils existing on the waterfront in the port of New York.[1] In response to these public exposures and for the purpose of eliminating corruption, racketeering, loansharking and various other evils then in existence

[1] Page 7, defendant's principal brief.

on the waterfront, the joint legislatures of New York and New Jersey enacted the Waterfront Commission Act in 1953.[2] Subsequently, Part I of the Act, representing an interstate compact between the states of New York and New Jersey, was submitted to and approved by Congress.[3]

The Waterfront Commission compact encompasses a series of remedial measures designed to eliminate the waterfront evils that had been publicly exposed over prior decades. The most important of these measures was the creation of a bi-state regulatory body, the Waterfront Commission of New York Harbor. Prior to the creation of the Commission, the one evil most often cited as the primary source of favoritism, kickbacks and other undesirable conditions was the vast oversupply of labor existing on the waterfront. Thus, *inter alia,* the Commission was empowered to maintain a register for longshoremen and checkers;[4] to open or close admissions to the register, thereby regulating the size of the waterfront labor force;[5] to exclude from the register those persons with an undesirable criminal background;[6] and to remove from the work force thos persons who do not apply regularly for work in compliance with such standards as may be established by the Commission.[7] The power given to the Commission has as one of its primary goals the regulation of the size of the waterfront labor force for the purpose of

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[2] N.Y. Laws, 1953, C.882 (McK. Unconsol. Laws § 6700aa *et seq.*); N.J. Laws, 1953, C.202 (R.S. 32:33-1 *et seq.*).

[3] Act of August 12, 1953, c.407, 67 Stat. 541.

[4] § 5-P; McK. Unconsol. Laws 9906; N.J.S.A. 32:23-114.

[5] *Id.*

[6] McK. Unconsol. Laws 9841; N.J.S.A. 32:23-41. Also see, McK. Unconsol. Laws 9844; N.J.S.A. 32:23-44.

[7] McK. Unconsol. Laws 9834 to 9837; N.J.S.A. 32:23-24 to 32:23-38.

stabilizing the employment of workers through the prevention of an excess number of employees on the register.

The Instant Controversy

The instant controversy arises out of a chronic "checker shortage" existing in the Harbor. In past attempts to alleviate similar checker shortage problems, plaintiffs N.Y.S.A. and I.L.A. had negotiated collective bargaining agreements which provided for the temporary transfer of employees in the longshoremen category into the checker category. These collective bargaining agreements, which enabled plaintiffs N.Y.S.A. and I.L.A. to determine which employees would fill the vacant checker slots, were approved by the Commission. In response to the current checker shortage, plaintiffs' attempted solution was to maintain the current number of employees in the longshoremen category, and to bring in new employees from the outside to fill the checker rosters. The Commission, however, had determined that an excess of longshoremen currently existed in the register and therefore refused to accept the solution proposed by plaintiffs. Instead, the Commission issued its own solution to the checker shortage, hereinafter referred to as Determination 15.

Determination 15 proposes the voluntary transfer of 200 employees currently included on the longshoremen's register into the checker category. The Commission's proposal would give a preference to those employees who due to physical disability are unable to perform more strenuous labor as longshoremen. The Commission has determined that a transfer of these longshoremen into checker status would achieve three goals which are consistent with the meaning and purpose of the Act; first, it would provide the manpower necessary to eliminate the checker shortage; second, it would eliminate some of the excess

number of employees on the longshoremen's register; and, finally, it would result in an enormous savings to the entire New York Harbor network. Plaintiffs, however, assert that Determination 15 interferes with their federally guaranteed ability to engage in private collective bargaining, claiming that it is their sole province "to establish through collective bargaining the seniority hiring procedures, hiring priorities and other terms and conditions of employment of waterfront workers within their bargaining unit." Plaintiffs chose not to seek judicial review of this matter in the state courts as is provided for in § 5-P of the compact[8] but instead came to this court seeking to enjoin the implementation of Determination 15.

Essential to the resolution of this case is the determination of the following issues:

I. whether the instant controversy presents an appropriate occasion for this court to decline to exercise its discretion, and thereby invoke the doctrine of Absention, thus deferring resolution of the within issues to an appropriate state tribunal;

II. whether the Commission in promulgating Determination 15 acted beyond the power delegated to it by the statutes of New York and New Jersey enacted for the purpose of implementing the compact; and

III. whether the Commission's Determination 15, if authorized by the Waterfront Commission Act, is in direct conflict with plaintiffs federally protected collective bargaining rights, thereby invoking its preemption under federal labor law.

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[8] § 5-P of the compact, referred to herein as N.J.S.A. 32:23-114, is fully reproduced [at the end] of this opinion.

Appendix C—Opinion.

I

In asking this court to abstain, defendant relies upon *Railroad Commission of Texas* v. *Pullman,* 312 U.S. 496 (1940) and related cases. The *Pullman* line of cases encourages federal courts to abstain from exercising jurisdiction in cases where such jurisdiction would otherwise be proper, if a substantial question arises about the interpretation of a state law and the state court is an entirely more appropriate forum to resolve the conflict. *Pullman, supra; Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943); *Alabama Pub. Serv. Com.* v. *Southern R. Co.,* 341 U.S. 341 (1951).

However, abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. A federal court is not required to exercise its judicial discretion to dismiss a suit on abstention grounds merely because a state court *could* entertain it. *Colorado River Water Cons. Dist.* v. *U.S.,* 424 U.S. 800, 47 L.Ed.2d 483 (1976). Abstention will be appropriate where there have been presented significant and difficult questions of state law bearing on policy problems of substantial public import. *Louisiana Power & Light* v. *City of Thibodaux,* 360 U.S. 25 (1959). Thus, if review of those questions by a federal court would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern, the federal court should abstain. *Burford, supra; Colorado River Water, supra.* However, an additional consideration cited for reserving abstention only to extraordinary circumstances is the undue expense and delay which has been referred to as "an unnecessary price to pay for our federalism." *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411, 11 L.Ed.2d 440 (1964). Thus, special circumstances must exist to justify abstention be-

cause "abstention operates to require piecemeal adjudication in many courts . . . thereby delaying ultimate adjudication on the merits for an undue length of time." *Baggett* v. *Bullitt*, 377 U.S. 360, 12 L.Ed.2d 377 (1964).

In this case the special circumstances required to support abstention are not present. This controversy does not require this court to resolve significant or difficult issues of state law which involve matters of purely local concern. *Louisiana Power & Light, supra.*

There is no contention that the state statute involved is unclear or ambiguous—rather the issue is whether certain action taken by the Commission was *authorized* by the statute. The state legislative and congressional intent regarding the Act are clearly ascertainable from the record before this court. There is no allegation that an ongoing state proceeding is considering the same issues. In addition, the issues presented herein are not ones of purely local concern. This fact is made clear by an express direction of Congress, which, in giving its stamp of approval to the Act and the compact, recognized the impact which matters relating to the New York Harbor have on commerce and the nation as a whole.

Finally, abstention must be rejected because of the inherent delay occasioned by its exercise. The present record shows the emergent nature of the checker shortage and the possibility it might lead to labor unrest at the waterfront. It is clear that a disruption of labor at the Harbor would have severe economic effects. Invocation of abstention and delaying resolution of this controversy until such time as a state court could entertain it would no doubt worsen the present checker shortage and might precipitate labor unrest.

Thus, since there exist no special circumstances which would *compel* abstention, I will exercise my discretion to entertain the merits at this time.

II

In ascertaining the validity of Determination 15, this court cannot ignore the purpose behind the Act and the Waterfront Commission itself. This legislation is primarily oriented toward the elimination of racketeering, kickbacks and various other forms of corruption which had been exposed by the investigations of prior decades. In vesting the Commission with the power to control and shape the size of the labor force, the joint state legislatures, as approved by Congress, obviously felt that the various evils which had previously thrived on the vast oversupply of longshoremen could be eliminated. The brief and affidavits submitted by the Commission stress that the action embodied in their Determination 15 will provide a great economic savings to the New York Harbor. In a hearing conducted by the Commission, both employees and employers alike testified as to the economic utility of resolving the checker shortage by transferring employees currently on the longshoremen's register, rather than introducing new workers from outside.

There are two groups of longshoremen who are currently idle and are frequently an unutilized element of the Harbor labor force. One group consists of employees with physical disabilities which render them unable to perform the arduous work required of a longshoreman. The second group consists of able longshoremen who, due to their advanced seniority status, are not required to assume the most strenuous longshoremen's duties and, therefore, frequently are not utilized. An individual in either group, however, continues to receive a guaranteed annual income (G.A.I.) of approximately $15,000 when he is not working. Clearly then, a transfer of some 200 longshoremen from the foregoing groups would not only alleviate the checker shortage but terminate G.A.I. benefits that would result,

it is said, in a net savings to the industry of approximately $3 million annually. Finally, the Commission argues, in addition to increasing efficiency by solving the checker shortage and creating a vehicle for Harbor-wide savings, Determination 15 fosters the statutory purpose of regulating the size of the longshoremen's register.

Plaintiffs, however, base their argument that Determination 15 *"ultra vires"* on the fact that N.J.S.A. 32:23-114 (§ 5-P of the Waterfront Commission Compact), under which the Commission promulgated Determination 15 does not expressly give the Commission authority to either transfer workers from one category to another, or to create a transfer preference in favor of disabled longshoremen. However, it is apparent that § 5-P also does not expressly withhold such authority. Plaintiffs are correct in asserting that § 5-P only expressly enables the Commission to open or close the register to new applicants in order to regulate the size of the Harbor labor force. However, § 5-P also specifically compels the Commission to "encourage the mobility and full utilization of the existing work force of longshoremen".[9]

It is clear that the checker shortage is not a new problem. Nor is a transfer of longshoremen to checker status a new solution to that problem. In the past, in response to identical shortages, plaintiffs approved transfers of longshoremen into checker status. Now, plaintiffs oppose Determination 15, not because they claim that transfer is any less viable a solution now than it was in the past but because it interferes with plaintiffs' exclusive right "to establish through collective bargaining the seniority hiring procedures, hiring priorities and other terms and conditions of employment of waterfront workers within their bargaining unit".

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[9] N.J.S.A. 32:23-114(2)(c).

Appendix C—Opinion.

There can be no question but that the Act, as approved by Congress, has as its major thrust the "cleaning-up" and maintenance of the waterfront so as to eliminate the problems of the past. To this end, the Commission has been granted the exclusive authority to control and regulate the size of the labor force therein. Determination 15 is clearly consistent with and in furtherance of that objective. Defendant Commission, in an attempt to "encourage the mobility and full utilization of the existing work force of longshoremen" has resolved to fill the checker shortage by reduction of the excessive longshoremen's register. As stated, Determination 15 provides for the voluntary transfer of 200 longshoremen into the checker category. In addition, preference is to be given to the registration of disabled longshoremen as checkers. This solution is not only economical and practical but is consistent with the objectives of the Act.

Despite the claim that Determination 15 violates the compact because it creates a new order of priority in registration, it is clear that Determination 15 is not inconsistent with § 5-P of the compact. The Commission's solution does not interfere with the plaintiffs' ability to determine the seniority status of the transferred workers. Nor does it create a new *hiring* priority which the employers must follow in selecting employees. Once workers have been transferred into the checker register, the unions are free to negotiate and establish whatever seniority provisions they wish. And employers are still compelled to hire from the register based upon the collectively bargained priority and seniority provisions. Determination 15 merely regulates the size of the longshoremen's register and increases the number of workers available for duty as checkers. The fact that the Commission has created new categories for the registration of checkers does not render Determination 15 *ultra vires.* Both the voluntary transfer of 200 longshore-

men—and the stated registration preference for disabled workers—are reasonable, practical and economical solutions that are entirely consistent with the purposes and policies of the Act. Determination 15 suggests a solution which would provide an enormous overall financial benefit to the entire Harbor. Employers would save large quantities of money—and the overall efficiency of the Port would increase. If, as plaintiffs contend, Determination 15 creates a shortage of longshoremen in a certain labor category, the Commission is empowered, pursuant to § 5-P, to open up the register to fill that shortage.

Congress put its stamp of approval on the policy behind controlling the waterfront problems when it adopted the Act. While it is true that § 5-P was not part of the original Act as approved by Congress, there is no question but that Congress intended to invest the Commission with broad powers to effectuate the statutory purposes and legislative intent. Thus, "in giving its approval to the compact Congress explicitly gave its authority to such supplementary legislation in accord with the objectives of the compact by providing in the clause granting consent '[t]hat the consent of Congress is hereby given to the compact set forth . . . and to the carrying out and effectuation of said compact, and enactments in furtherance thereof.'" *DeVeau* v. *Braisted,* 363 U.S. 144, 4 L.Ed.2d 1109, 1115 (1960). Clearly, Determination 15 is "such supplementary legislation" designed to effectuate and carry out the mandates of the compact. The fact that the *methods* employed by the Commission in so effectuating the compact are not specifically authorized by § 5-P does not render Determination 15 outside the scope of authority granted by the Act. *DeVeau, supra.*

III

If the Waterfront Commission Act were purely a creature of bi-state law, the doctrine of preemption would be applicable to remedy any existing conflicts between it and federal labor law. State attempts to influence the substantive terms of collective-bargaining agreements may conflict with federal labor law. *Lodge 76, etc.* v. *Wisconsin Emp. Rel. Com.*, 427 U.S. 132 (1976). It is recognized that matters of seniority classification, hiring priorities and employee transfers from section to section, are commonly matters subject to collective bargaining and generally within the exclusive province of employers and unions. Thus, where a state law empowers a state commission to intrude into areas normally reserved to collective bargaining, federal preemption might bar such state action whenever it directly infringes upon rights guaranteed by the federal Labor Act. *Lodge 76, etc.* v. *Wisconsin Emp. Rel. Com., supra.* However, the touchstone to finding a basis for preemption in this type of controversy must be Congressional intent to preempt. *Amalgamated Transit Union, etc.* v. *Byrne*, 568 F.2d 1025 (3d Cir. 1977) (*en banc*).

Here, Congress has specifically adopted the bi-state legislation. In approving the Act, Congress has already authorized the impairment of collective bargaining rights as provided by federal labor law. Inasmuch as the Commission was granted total control over the expansion or reduction of the work force, the Commission's authority already "infringes" upon collective bargaining functions normally reserved only to employers and unions. Thus, Congress has already created an exception and specifically sanctioned the Commission's exercise of authority in an area traditionally reserved to plaintiffs' exclusive control. As *De Veau, supra,* sets forth, Congress specifically an-

ticipated the need for future enactments and other action necessary to the carrying out and effectuation of the compact. In vesting the Commission with sole power to control the size and character of the labor force, Congress specifically sanctioned the Waterfront Act, with full knowledge and intention that its specific provisions would override the general policies of federal labor rights if the two came in conflict. In contemplating the Commission's need to enact, *in futuro,* further edicts to continue to effectuate the policies of the compact, Congress approved those additional interferences with federal labor law which might arise as a natural consequence thereof.

It is by no means clear that Determination 15 creates any further impairment of plaintiffs' collective bargaining rights than did the compact as originally approved. Determination 15 does not interfere with plaintiffs' rights to ". . . bargain collectively and agree upon any method for the selection of such employees by way of seniority, experience, regular gangs or otherwise. . . ." because it does not attempt to dictate to the employers or unions the manner in which employees are to be selected for employment. Since the transfer is voluntary, a longshoreman who wishes to become a checker does so with a knowing and intentional waiver of his prior seniority status, and subjects himself to whatever new terms and conditions are negotiated on his behalf. Plaintiffs are still free to determine the seniority, order of hiring, etc. of the new checkers once they enter the register. All Determination 15 does is dictate the manner in which the checker and longshoremen registers are to be filled and regulated. There can be no question but that this is within the sole authority and discretion of the Commission. Once the registers have been filled, plaintiffs are not the least bit impaired from collectively bargaining on the issues of seniority, hiring priority, etc.

Appendix C—Opinion.

In promulgating Determination 15, the Commission has determined, that in the best interests of New York Harbor, 200 more employees are needed in the checker force. It is the opinion of the Commission, whose factual determinations this court is not able to disturb, that a transfer is the most practical and economical method of alleviating the checker shortage. Determination 15 accomplishes three major purposes: (1) it increases the checker register, thereby eliminating the shortage; (2) it decreases the size of the longshoremen's register, thereby reducing the excess of longshoremen, and (3) it creates new categories and priorities for the registration of checkers, which, according to its own factual determinations, will result in an enormous increase of efficiency and economic savings to the entire Harbor industry.

IV

In light of the foregoing, it should be apparent that Determination 15 does not represent an *ultra vires* exercise of the Commission's power, but rather is consistent with and in furtherance of the underlying purposes and policies of the compact. It it doubtful that Determination 15 infringes plaintiffs' collective bargaining rights to a degree greater than did the compact as originally written and approved by Congress. If it does so, then that impairment was specifically anticipated by Congress and has its approbation, for in approving the compact Congress also put its imprimatur on future legislation in furtherance of the original policies and purposes of the compact. Since Determination 15 implements the primary goal of the compact, any infringement it makes upon federally guaranteed collective bargaining rights represents a congressionally approved exercise of power by the Commission.

For the foregoing reasons, plaintiffs' request for a preliminary injunction is denied. Plaintiffs' cross-motion for summary judgment will also be denied and an order granting summary judgment will be entered in favor of defendant.

DATED: June 1, 1978.

32:23-114. Suspension or acceptance of applications for inclusion in longshoremen's register; determination; standards

The commission shall suspend the acceptance of application for inclusion in the longshoremen's register for a period of 60 days after the effective date of this act. Upon the termination of such 60 day period the commission shall thereafter have the power to make determinations to suspend the acceptance of application for inclusion in the longshoremen's register for such periods of time as the commission may from time to time establish and, after any such period of suspension, the commission shall have the power to make determinations to accept applications, which shall be processed in the order in which they are filed with the commission, for such period of time as the commission may establish or in such number as the commission may determine, or both. Such determinations to suspend or accept applications shall be made by the commission on its own initiative or upon the joint recommendation in writing of stevedores and other employers of longshoremen in the Port of New York District, acting through their representative for the purposes of collective bargaining with a labor

organization representing such longshoremen in such district and such labor organization, which joint recommendation the commission shall have the power to accept or reject.

2. In administering the provisions of this section, the commission shall observe the following standards:

(a) To encourage as far as practicable the regularization of the employment of longshoremen;

(b) To bring the number of eligible longshoremen into balance with the demand for longshoremen's services within the Port of New York District without reducing the number of eligible longshoremen below that necessary to meet the requirements of longshoremen in the Port of New York District;

(c) To encourage the mobility and full utilization of the existing work force of longshoremen;

(d) To protect the job security of the existing work force of longshoremen;

(e) To eliminate oppressive and evil hiring practices injurious to waterfront labor and waterborne commerce in the Port of New York District, including, but not limited to, those oppressive and evil hiring practices that may result from either a surplus or shortage of waterfront labor;

(f) To consider the effect of technological change and automation and such other economic data and facts as are relevant to a proper determination.

In observing the foregoing standards and before determining to suspend or accept applications for inclusion in the longshoremen's register, the commission shall consult with and consider the views of,

including any statistical data or other factual information concerning the size of the longshoremen's register submitted by, carriers of freight by water, stevedores, waterfront terminal owners and operators, any labor organization representing employees registered by the commission, and any other person whose interests may be affected by the size of the longshoremen's register.

3. Any determination by the commission pursuant to this section to suspend or accept applications for inclusion in the longshoremen's register shall be made upon a record, shall not become effective until 5 days after notice thereof to the collective bargaining representative of stevedores and other employers of longshoremen in the Port of New York District and to the labor organization representing such longshoremen and shall be subject to judicial review for being arbitrary, capricious, and an abuse of discretion in a proceeding jointly instituted by such representative and such labor organization. Such judicial review proceeding may be instituted in either State in the manner provided by the law of such State for review of the final decision or action of administrative agencies of such State, provided, however, that such proceeding shall be decided directly by the appellate division as the court of first instance (to which the proceeding shall be transferred by order of transfer by the Supreme Court in the State of New York or in the State of New Jersey by notice of appeal from the commission's determination) and provided further that notwithstanding any other provision of law in either State no court shall have power to stay the commission's determination prior to final judicial decision for

more than 15 days. In the event that the court enters a final order setting aside the determination by the commission to accept applications for inclusion in the longshoremen's register, the registration of any longshoremen included in the longshoremen's register as a result of such determination by the commission shall be cancelled.

This section shall apply, notwithstanding any other provision of this act, provided, however, such section shall not in any way limit or restrict the provision of section 5 of article IX of this act[1] empowering the commission to register longshoremen on a temporary basis to meet special or emergency needs or the provisions of section 4 of article IX of this act[2] relating to the immediate reinstatement of persons removed from the longshoremen's register pursuant to article IX of this act.[3] Nothing in this section shall be construed to modify, limit or restrict in any way any of the rights protected by article 15 of this act.[4] L.1966, c. 18, § 2, supplementing L.1953, c. 202.

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[1] Section 32:23-38.

[2] Section 32:23-37.

[3] Sections 32:23-34 to 32:23-38.

[4] Sections 32:23-68, 32:23-69.

APPENDIX D

Relevant Statutes

1. § 1, National Labor Relations Act, as amended, 29 U.S.C. § 151:

"§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Appendix D—Relevant Statutes.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

2. Waterfront Commission Compact of New York and New Jersey.

(a) Part I, § 1, Art. VIII, ¶ 1, codified in New York Unconsol. Laws § 9868 (McKinney 1974) and in N.J.S.A. 32:23-27 (1963):

"Longshoremen's register

The commission shall establish a longshoremen's register in which shall be included all qualified longshoremen eligible, as hereinafter provided, for employment as such in the Port of New York district. On or after the first day of December, nineteen hundred fifty-three, no person shall act as a longshoreman within the Port of New York district unless at the time he is included in the longshoremen's register, and no person shall employ another to work as a longshoreman within the Port of New York district unless at the time such other person is included in the longshoremen's register."

(b) Part I, § 1, Art. XV, ¶ 1, codified in New York Unconsol. Laws § 9868 (McKinney 1974) and in N.J.S.A. 32:23-68 (1963):

"Certain rights of employees not limited by compact

This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and through labor organizations or other representatives of their own choosing. Without limiting the generality of the foregoing, nothing contained in this compact shall be construed to limit in any way the right of employees to strike."

(c) Part I, § 1, Art. XV, ¶ 2, codified in New York Unconsol. Laws § 9869 (McKinney 1974) and in N.J.S.A. 32:23-69 (1963):

"Collective bargaining rights not limited

This compact is not designed and shall not be construed to limit in any way any rights of longshoremen, hiring agents, pier superintendents or port watchmen or their employers to bargain collectively and agree upon any method for the selection of such employees by way of seniority, experience, regular gangs or otherwise; *provided,* that such employees shall be licensed or registered hereunder and such longshoremen and port watchmen shall be hired only through the employment information centers established hereunder and that all other provisions of this compact be observed."

(b) Part I, § 1, Art. XVI, ¶ 1, codified in New York Unconsol. Laws § 9870 (McKinney 1974) and in N.J.S.A. 32:23-70 (1963):

"Amendments and supplements

Amendments and supplements to this compact to implement the purposes thereof may be adopted by the action of the Legislature of either state concurred in by the Legislature of the other."

3. Act of Aug. 12, 1953, c.407, 67 Stat. 541:

"CHAPTER 407—PUBLIC LAW 252

[S. 2383]

An Act granting the consent of Congress to a compact between the State of New Jersey and the State of New York known as the Waterfront Commission Compact, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The consent of Congress is hereby given to the compact set forth below to all of its terms and provisions, and to the carrying out and effectuation of said compact, and enactments in furtherance thereof:"

* * *

4. Waterfront Commission Act of New York and New Jersey, § 5-p, added to the Compact in New York by 1966 N.Y. Laws c.127, § 3 (codified in New York Unconsol. Laws § 9920 (McKinney 1974)) and in New Jersey by 1966 N.J. Laws c.18, § 2 (codified in N.J.S.A. 32:23-114 (1963)):

"Suspension or acceptance of applications for inclusion in longshoremen's register; determination; standards

The commission shall suspend the acceptance of application for inclusion in the longshoremen's register for a period of 60 days after the effective date of this act. Upon the termination of such 60 day period the commission shall thereafter have the power to make determinations to suspend the acceptance of application for inclusion in the longshoremen's register for such periods of time as the commission may from time to time establish and, after any such period of suspension, the commission shall have the power to make determinations to accept applications, which shall be processed in the order in which they are filed with the commission, for such period of time as the commission may establish or in such number as the commission may determine, or both. Such determinations to suspend or accept applications shall be made by the commission on its own initiative or upon the

joint recommendation in writing of stevedores and other employers of longshoremen in the Port of New York District, acting through their representative for the purpose of collective bargaining with a labor organization representing such longshoremen in such district and such labor organization, which joint recommendation the commission shall have the power to accept or reject.

2. In administering the provisions of this section, the commission shall observe the following standards:

(a) To encourage as far as practicable the regularization of the employment of longshoremen;

(b) To bring the number of eligible longshoremen into balance with the demand for longshoremen's services within the Port of New York District without reducing the number of eligible longshoremen below that necessary to meet the requirements of longshoremen in the Port of New York District;

(c) To encourage the mobility and full utilization of the existing work force of longshoremen;

(d) To protect the job security of the existing work force of longshoremen;

(e) To eliminate oppressive and evil hiring practices injurious to waterfront labor and waterborne commerce in the Port of New York District, including, but not limited to, those oppressive and evil hiring practices that may result from either a surplus or shortage of waterfront labor;

(f) To consider the effect of technological change and automation and such other economic data and facts as are relevant to a proper determination.

In observing the foregoing standards and before determining to suspend or accept applications for inclusion in the longshoremen's register, the commission shall consult with and consider the views of, including any statistical data or other factual information concerning the size of the longshoremen's register submitted by, carriers of freight by water, stevedores, waterfront terminal owners and operators, any labor organization representing employees registered by the commission, and any other person whose interests may be affected by the size of the longshoremen's register.

3. Any determination by the commission pursuant to this section to suspend or accept applications for inclusion in the longshoremen's register shall be made upon a record, shall not become effective until 5 days after notice thereof to the collective bargaining representative of stevedores and other employers of longshoremen in the Port of New York District and to the labor organization representing such longshoremen and shall be subject to judicial review for being arbitrary, capricious, and an abuse of discretion in a proceding jointly instituted by such representative and such labor organization. Such judicial review proceeding may be instituted in either State in the manner provided by the law of such State for review of the final decision or action of administrative agencies of such State, provided, however, that such proceeding shall be decided directly by the appellate division as the court of first instance (to which the proceeding shall be transferred by order of transfer by the Supreme Court in the State of New York or in the State of New Jersey by notice of appeal from the commission's determination) and provided further that notwithstanding any other provision of law in either State no court shall have power to stay the com-

mission's determination prior to final judicial decision for more than 15 days. In the event that the court enters a final order setting aside the determination by the commission to accept applications for inclusion in the longshoremen's register, the registration of any longshoremen included in the longshoremen's register as a result of such determination by the commission shall be cancelled.

This section shall apply, notwithstanding any other provision of this act, provided however, such section shall not in any way limit or restrict the provisions of section 5 of article IX of this act empowering the commission to register longshoremen on a temporary basis to meet special or emergency needs or the provisions of section 4 of article IX of this act relating to the immediate reinstatement of persons removed from the longshoremen's register pursuant to article IX of this act. Nothing in this section shall be construed to modify, limit or restrict in any way any of the rights protected by article 15 of this act."

APPENDIX E

Oral Argument

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CIVIL No. 78-995

NEW YORK SHIPPING ASSOCIATION, INC., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Plaintiffs,

—VS—

WATERFRONT COMMISSION OF NEW YORK HARBOR,
Defendant.

May 26, 1978
Newark, New Jersey

BEFORE:

The Honorable H. CURTIS MEANOR, U.S.D.J.

APPEARANCES:

IRWIN HERSCHLAG, ESQ.
and
MESSRS. LORENZ, FINN, GIARDINO & LAMBOS
BY: C. PETER LAMBOS, ESQ. (N.Y. Bar)
and
D. CARUSO, ESQ.
Attorneys for Plaintiff N. Y. Shipping Assoc.

MESSRS. GLEASON, LAITMAN & MATHEWS
BY: THOMAS W. GLEASON, ESQ. (N.Y. Bar)
Attorneys for Plaintiff

Appendix E—Oral Argument.

GERALD P. LALLY, ESQ.
General Counsel for Defendant Waterfront Comm.
and
IRVING MALCHMAN, ESQ.
Director of Litigation and Research for
Defendant Waterfront Commission

Reported by:
Thomas F. Brazaitis, C.S.R.
Official Court Reporter

* * * * * *

(31) and agreed upon you wouldn't need to come to somebody like me.

I'll admit that I find nothing in the statute that specifically enables the Commission to do what it's done. However, I am told that one of the so-called evils on the docks that led to the creation of the Commission was a surplus of longshoremen. I read this in the, I think the Legislative Preamble. It says that the intensive competition for longshoremen for a job encouraged the paying of kickback to hiring agents, it perhaps encouraged pilferage, it made longshoremen prey to loan sharks and things like that.

Isn't one of the powers specifically granted to the Commission to control the number of outstanding longshoremen available for work so that there wouldn't be this cutthroat, intensive competition for jobs, and the evils that men may perpetrate because of such competition may well be limited?

Mr. Lambos: Your Honor, the evil that the statute talks about in 1953 have been somewhat controlled. In 1953 I point out there were some 70,000 longshoremen, and we're talking now about a work force of 10,000.

Now, the more important thing—

The Court: You've told me you've got ten or 11,000 you've got work for seven or eight. So you've got 3,000 surplus.

* * *

(58) in the Compact not only authorized the Compact itself but it also authorized implementing legislation designed to further the purposes of the Compact.

I view Section 5-p as that kind of implementing legislation. I believe the DeVeau case will support that proposition.

Therefore, the motion for summary judgment of the plaintiff will be denied and that of the defendants will be granted.

The request for injunction by the plaintiff is, therefore, of course becoming most. And you will hear from me next week with a written exposition.

Now, I presume you gentlemen desire to appeal?

Mr. Lambos: Yes, sir.

The Court: I took the trouble to check with the Judge of the Court of Appeals. I find that there will be two panels of the Court of Appeals sitting in Philadelphia on June 5th. And I suggest you make prompt arrangements to get this matter before a panel for relief you may seek pending an appeal.

Now, I'm perfectly willing to entertain an application, gentlemen, to give a short stay of the actual certification of checkers, but, however, to permit the continued practices as I have in the past.

In my view the issue is serious. I think there (59) is a question on both sides highly arguable. And I would rather leave it to the Court of Appeals to determine whether there should be a stay pending an appeal and in its entirety, but I doubt it would be appropriate [*sic*] for me to give a stay long enough for you to get a determination from the Court of Appeals as to whether the stay pending the entire appeal shall be granted.

Mr. Lambos: New York Shipping Association moves for such a stay, your Honor. And we intend to appear before the panel of the Court of Appeals on the 5th of June and make an application for a stay before that Board.

The Court: On the abundance of causes, is there any objection if I extend the stay to June 9th subject, of course, to a determination from the Court Appeals on June 5th that no stay will be required and the remaining four days of the stay I give can, of course, then be vacated?

Mr. Malchman. There's no objection, your Honor.

The Court: All right. Will somebody present me next week with an order? I presume the Commission will? I'd like consent as to form as soon as possible. Would you prefer that I call you when the written opinion is ready so it can be picked up rather than to trust the mails?

78-664

No. 664

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NEW YORK SHIPPING ASSOCIATION, INC., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Statement

Petitioners herein (the New York Shipping Association, Inc. ("NYSA") and the International Longshoremen's Association ("ILA"), seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit, affirming without opinion the judgment of the United States District Court for the District of New Jersey granting summary judgment to respondent Waterfront Commission.

This is an action by the NYSA and ILA for a declaratory judgment, together with accompanying injunctive relief, that Commission Determination No. 15, dated March 17, 1978 (1a*) providing for the transfer of 200 longshoremen to checker status to alleviate a critical shortage of checkers

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* References to "a" are to the Appendix to the Commission's brief in the Court of Appeals.

in the Port of New York and New Jersey which was impairing the effective operations of the Port is unlawful because it is unauthorized by the Waterfront Commission Compact and also because it interferes with federally protected collective bargaining rights. (Basically a longshoreman does the work involved in the loading and unloading of ships whereas a checker does the paper work involved in tallying the cargo.) Under the Waterfront Commission Act a checker is a "longshoreman" (McK. Unconsol. Laws 9905(5); N.J.S.A. 32:23-85(5)). The NYSA is the collective bargaining representative of the employers (steamship companies and stevedores) of waterfront workers in the Port and the ILA is the union that represents those employees.

Commission Determination No. 15 was made after a hearing (as to which the NYSA and ILA were given notice but which they boycotted) (8a) held pursuant to the specific statutory authority of the Commission to regulate, in the public interest, the size of the work force in the Port (App. D to petition, pp. 27a-30a). Commission Determination No. 15 adds (by the transfer of longshoremen) 200 checkers to the present work force of approximately 2,000 checkers in the Port. The NYSA and ILA concede that there was a shortage of checkers in the Port and that the Waterfront Commission Compact empowers the Commission to regulate the size of the work force in the Port. The NYSA and ILA contend, however, that the Commission can eliminate the shortage of checkers only by adding new workers from outside the industry—and not by permitting a voluntary transfer of longshoremen to checker status notwithstanding the fact that there is a surplus of longshoremen in the Port.

The present work force of longshoremen in the Port consists of about 9,200 longshoremen and 2,000 checkers (8a). Of these, during the last contract year, about 500 received full Guaranteed Annual Income ("GAI") pay-

ments of $16,640 for doing no work at all and an additional 2,000 longshoremen received at least $10,000 in GAI payments (8a). Commission Determination No. 15 provides, as stated, for a *voluntary* transfer of 200 longshoremen to checker status in order of seniority with a preference being given to those longshoremen who are physically incapable of satisfactorily performing as longshoremen but who would be capable of performing as checkers and who desire to become checkers (3a-5a).

There was, as stated, no dispute between the parties as to the need for additional checkers in the Port. The point of difference, which had blocked an amicable solution to the checker shortage, ever since the summer of 1976, was the ILA's demand for a package solution which would give the ILA patronage by permitting the ILA to bring in from outside the industry some of the additional persons to be registered by the Commission as checkers (15a), a procedure which would be in direct contravention of the statutory provision providing that any addition of men to the work force shall be done by the Commission upon a first-come, first-served basis, that is, "application . . . shall be processed in the order in which they are filed with the commission" (McK. Unconsol. Laws 9920(1); N.J.S.A. 32:23-114).

Because the problem of the checker shortage had reached such proportions that it could no longer be temporized with, the Commission determined to act, held the hearing required by law, and then issued its Determination No. 15 in which the Commission requested the cooperation of management and labor in effecting the transfer of 200 persons from longshoremen to checker status (18a, 3a-4a). Further negotiations followed with the NYSA and ILA which again broke down (18a). The Commission then proceeded with the implementation of Determination No. 15 (which the Commission had postponed several times) in order to permit negotiations to continue (18a). The instant action then ensued.

Reasons for Denying the Writ

I

Commission Determination No. 15 is entirely proper under Section 5-p of the Waterfront Commission Act and is in no respect "arbitrary, capricious and an abuse of discretion".

It is the intendment of Section 5-p to vest the Waterfront Commission with the greatest possible discretion in determining the manpower needs of the Port and in implementing the standards enumerated in Section 5-p for the Commission's guidance in exercising such discretion.

Thus, Subsection 1 of Section 5-p authorizes the Commission to make determinations to accept, or suspend the acceptance of, applications for inclusion in the longshoremen's register, that is, to open and close the register. Subsection 2 enumerates certain standards of extremely broad scope for observation by the Commission in administrating its power to open and close the longshoremen's register, such as "To encourage the mobility and full utilization of the existing work force of longshoremen" (2(c)) or "To consider the effect of technological change and automation and such other economic data and facts as are relevant to a proper determination" 2(f). Then, Section 5-p specifically provides in Subsection 3 that the Commission's determination shall be subject to judicial review only "for being [in the conjunctive] arbitrary, capricious and an abuse of discretion".

It would be difficult to write a broader grant of discretionary authority to an administrative agency.

Petitioners contend that Section 5-p limits the Commission to the addition of new workers from outside the industry. This contention does not withstand scrutiny.

First, there is nothing in Section 5-p that says the Commission, in opening the register, must take workers from outside the industry. Further, one of the statutory standards set forth in Subsection 2(d) of Section 5-p for the observance of the Commission in exercising its discretion is "To encourage the mobility and full utilization of the existing work force of longshoremen". In view of the fact that there is presently a surplus of longshoremen in the Port, many of whom are collecting millions of dollars annually in GAI payments, it makes absolutely no sense whatever—much less constitutes an abuse of discretion—for the Commission to bring in new workers from outside the industry when there are already available a number of longshoremen who desire to work as checkers.

It would be a total absurdity for the Commission to require longshoremen who have been working many years in the industry and who desire to become checkers to get in line with new workers with no equity whatever on the waterfront in order to transfer to checker status.

A recurring refrain of petitioners is that the Commission is establishing seniority categories in derogation of petitioners' collective bargaining rights. Such is not the case at all. As would be true with the addition of new workers from outside the industry, the Commission in permitting a transfer of 200 longshoremen to checker status is simply adding men to the available work force. Petitioners NYSA and ILA are free to give whatever seniority rights they desire to the additional checkers, including the withholding of seniority entirely, provided that they do not nullify the Commission's determination by prohibiting the individual employers from employing these new additions to the checker work force. Once these 200 longshoremen are added to the checker work force, it then is up to each individual employer to decide whether or not he wishes to avail himself of these additional workers. The Commission does not require any individual employer to employ these new additions to the checker work force.

Petitioners also contend that the Commission, in giving preference to those longshoremen who are physically incapable of satisfactorily performing as longshoremen but who will be capable of performing as checkers, is establishing a new seniority category in derogation of plaintiffs' collective bargaining rights. Again, all that the Commission is doing is making such disabled longshoremen available for employment by the individual employers, with the NYSA and ILA being free to grant these new checkers whatever seniority—or indeed no seniority at all—that they desire, just as would be true with the addition of new workers from outside the industry.

In addition to providing in Subsection 2(c) of Section 5-p that the Commission shall seek "To encourage the mobility and full utilization of the existing work force of longshoremen", Subsection 2(d) expressly mandates the Commission "To protect the job security of the existing work force of longshoremen". Certainly, it is not "arbitrary, capricious and an abuse of discretion" for the Commission to serve these mandated standards by giving the physically disabled longshoremen a preference in applying for a transfer to checker status.

Petitioners repeatedly invoke in support of their position herein the provisions in the Compact, as well as in Section 5-p, safeguarding the right to engage in collective bargaining. However, the right to engage in collective bargaining safeguarded by the Compact, as well as by Section 5-p, is simply the right to bargain collectively *subject* to the substantive provisions of the Compact.

For example, the safeguard in the Compact of the right to engage in collective bargaining does not mean that a collective bargaining agreement can provide that longshoremen shall be hired through union hiring halls in derogation of the requirement of the Compact that longshoremen shall only be employed through Commission employment information centers (McK. Unconsol. Laws 9853;

N.J.S.A. 32:23-53) or provide minimum standards of application for work for longshoremen to remain in the industry in derogation of the minimum standards established by the Commission pursuant to its statutory power to periodically remove from the Register longshoremen who do not apply for work regularly as prescribed by the Commission (McK. Unconsol. Laws 9834; N.J.S.A. 32:23-34). Similarly the safeguard in Section 5-p of the right to bargain collectively does not mean that the NYSA and ILA in a collective bargaining agreement may regulate the size of the work force in the Port, thereby nullifying Section 5-p which vests the Commission—and not the NYSA and ILA—with the power to regulate the size of the work force.

II

Since Section 5-p is part of the Waterfront Commission Compact which has been approved by Congress, there is no tenable basis for petitioners' claim that Commission Determination No. 15 pursuant to Section 5-p is preempted by federal labor law.

If Determination No. 15 is found to be authorized by Section 5-p, then such a decision makes untenable any claim that Determination No. 15 invalidly conflicts with federal labor law because then the question would become the constitutionality of a valid application by the Commission of Section 5-p. Since Section 5-p is within the consent of Congress to the Waterfront Commission Compact, the *valid* application of Section 5-p, no more than Section 5-p itself, cannot be deemed to be preempted by federal labor law.

The Waterfront Commission Compact is an interstate compact between the States of New York and New Jersey which has been approved by Congress (67 Stat. 541). If Section 5-p had been enacted as part of the original Waterfront Commission Compact to which Congress had consented, there could be no basis whatever for petitioners' claim of federal preemption.

For example, in sustaining the constitutionality of Section 8 of the Waterfront Commission Act, which prohibits the collection of dues for waterfront unions having criminals as officers or employees and which has the legal status of independent state statute since it is not part of the Compact, the Court in *DeVeau* v. *Braisted,* 363 U.S. 144 (1960), relied upon the fact that Congress was mindful that Section 8 is part of the Waterfront Commission Act (which includes the Compact as Part I). The Court concluded from this that Congress in approving the Compact had demonstrated its intent, even though Section 8 is not formally part of the Compact, that Section 8 should stand despite the provision of National Labor Relations Act granting employees the right to bargain collectively through representatives of their own choice.

In *DeVeau,* the Court said, "Had § 8 been written into the Compact, even the most subtle casuistry could not conjure up a claim of pre-emption" (363 U.S., at p. 153). Here, although Section 5-p was not part of the original Compact approved by Congress, Section 5-p was enacted as "an agreement between the state of New York and New Jersey, supplementary to the waterfront commission compact and amendatory thereof" (1966 N.Y. Laws, c. 127, § 5; 1966 N.J. Laws, c. 18, § 4).

In approving the Compact, Congress itself, formally recognized that the conditions on the New York waterfront were primarily a matter for local regulation. This is reflected in the unusually broad scope of its consent to the Waterfront Commission Compact which consents to future, as well as present, legislation and which, moreover, does not reserve any federal jurisdiction with respect to regulation of interstate or foreign commerce. Thus, the Congressional consent to the Waterfront Commission Compact provides (67 Stat. 541):

> "The consent of Congress is hereby given to the compact set forth below, to all of its terms and provisions,

> and to the carrying out and effectuation of said compact, and enactments in furtherance thereof."

In *DeVeau*, the Court stated the following respecting the scope of the Congressional consent to the Waterfront Commission Compact, which is unprecedentedly broad in providing for future supplementary state legislation (363 U.S., at p. 154):

> "Finally, it is of great significance that in approving the compact Congress did not merely remain silent regarding supplementary legislation by the States. Congress expressly gave its consent to such implementing legislation not formally part of the compact. This provision in the consent by Congress is so extraordinary as to be unique in the history of compacts. Of all the instances of congresional approval of state compacts —the process began in 1791, Act of Feb. 4, 1791, 1 Stat. 189, with more than one hundred compacts approved since—we have found no other in which Congress expressly gave its consent to implementing legislation. It is instructive that this unique provision has occurred in connection with approval of a compact dealing with the prevention of crime where, because of the peculiarly local nature of the problem, the inference is strongest that local policies are not to be thwarted."

Section 5-p was enacted pursuant to this broad consent by Congress to future legislation by the States supplementary to the purposes and objectives of the Waterfront Commission Compact. And in point of fact, petitioners make no claim herein that Section 5-p itself is in any way invalid. Rather, the petition specifically states that in this case "the validity of § 5-p was not in issue" (p. 12).

III

Moreover, this is a singularly inappropriate case in which to consider a claim of conflict with federal labor policy because here that issue is seriously complicated by questions of unclean hands and abstention.

Petitioners seek certiorari mainly on the contention that Commission Determination No. 15 is in conflict with federal labor policy. But before that issue is even reached, substantial questions involving the doctrine of unclean hands and also the abstention doctrine must first be decided. These complicating questions make this case singularly inappropriate for consideration upon certiorari.

A.

As noted, petitioners' action is for a declaratory judgment together with accompanying injunctive relief. An action for an injunction is of course subject to the equitable defense of unclean hands. The same is true respecting petitioners' request for a declaratory judgment.

As has been stated by the Court, "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion exercised in the public interest." *Eccles* v. *Peoples Bank,* 333 U.S. 426, 431 (1948). More particularly, "the declaratory judgment and injunctive remedies are equitable in nature, and . . . equitable defenses may be interposed." *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 155 (1967). It has accordingly been held, in an action for declaratory judgment and injunction, that relief will be denied where the plaintiff came into court with unclean hands. *ESP Fidelity Corp.* v. *Department of Housing and Urban Development,* 512 F.2d 887 (9th Cir. 1975); *Lumbermans Mutual Casualty Company* v. *Quick,* 257 F.Supp. 252 (D.S.C. 1966) (inequitable conduct by plaintiff).

The NYSA and ILA seek to have this Court grant certiorari to set aside a Commission determination that adds men to the checker work force in order to eliminate a conceded shortage of checkers in the Port. In presenting their case, the petition of the NYSA and ILA speaks, in exalted terms, of the federally protected right to engage in collective bargaining. The real considerations underlying this action are much more mundane, however.

The ILA, together with its acquiescent partner in litigation, the NYSA, are in court because of the Commission's refusal to accede to the ILA's illegal demand (aided and abetted by the NYSA) for patronage as the price for permitting a transfer of longshoremen to checker status to eliminate the shortage of checkers. It is accordingly clear that the ILA and NYSA are guilty of inequitableness or bad faith relative to the matter as to which they seek judicial relief and that therefore they do not come into court with clean hands. E.g., *Precision Instrument Mfg.* v. *Automobile Maintenance Machinery Co.*, 324 U.S. 806, 814-816 (1945).

B.

In consenting to the Waterfront Commission Compact, Congress recognized that conditions on the New York waterfront were primarily a matter for local recognition. This is reflected in the unusually broad scope of its consent to the Waterfront Commission Compact, which consents to future, as well as present, legislation and which, moreover, does not reserve any federal jurisdiction with respect to regulation of interstate or foreign commerce (*supra*, pp. 8-9).

Further, in addition to constituting the Commission a "body corporate and politic and the instrumentality of the states of New York and New Jersey" (McK. Unconsol. Laws 9807; N.J.S.A. 32:23-7), the Compact specifically provides that the Commission's action in denying any application for a license or registration or in revoking or

suspending any license or registration "shall be subject to judicial review by a proceeding instituted in either state at the instance of the applicant, licensee or registrant in the manner provided by the law of such state for review of the final decision or action of administrative agencies of such state" (McK. Unconsol. Laws 9851; N.J.S.A. 32:23-51). The Compact also provides that, "The failure of any witness, when duly subpoenaed [by the Commission] to attend, give testimony or produce other evidence, whether or not at a hearing, shall be punishable by the superior court in New Jersey and the supreme court in New York in the same manner as said failure is punishable by such court in a case therein pending." (McK. Unconsol. Laws 9862; N.J.S.A. 32:23-62).

The Compact thus specifically provides for litigation in the state courts respecting Commission actions and determinations. In enacting Section 5-p as an amendment to the Compact, the States of New York and New Jersey similarly provided for judicial review of Commission determination thereunder in the state courts. The NYSA and ILA in this case seek to circumvent the express provisions of Section 5-p for judicial review of Commission determinations in the state courts.

The federal courts should not sanction this attempted end run around Section 5-p by the NYSA and ILA. Instead, dismissal of this action is mandated under the abstention doctrine. *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U.S. 341 (1951); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Dated: November 17, 1978

(63748)